

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
4-D and Chizoma, Inc.) ASBCA Nos. 49550, 49598
)
Under Contract No. DAHC76-95-V-2501)

APPEARANCE FOR THE APPELLANT: Mr. Chizoma Onyems
Owner

APPEARANCES FOR THE GOVERNMENT: COL Nicholas P. Retson, JA
Chief Trial Attorney
MAJ Richard J. Sprunk, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE SHACKLEFORD

ASBCA No. 49550 is an appeal from a termination for default of a purchase order to perform sewer related services at Fort Wainwright, Alaska. ASBCA No. 49598 is an appeal from a contracting officer's decision denying a claim for \$45,144 said to be due for materials, labor and transportation costs incurred prior to termination. Only entitlement is before us for decision.

FINDINGS OF FACT

1. On 18 August 1995, the Directorate of Contracting at Fort Wainwright, Alaska, issued Request for Quotations No. DAHC76-95-T-1871 (RFQ) for performing a sewer line television inspection to be performed in accordance with attached specifications and drawings. The scope of work was described in the Technical Specifications (Statement of Work) as follows:

SCOPE OF WORK: The Contractor shall provide all plant, labor, equipment, materials, supplies and supervision to perform the work, including work of an incidental nature, to perform a television inspection in accordance with the attached drawings and specifications. The work requires that the contractor clean the line, provide appropriate sized sewer plugs and provide bypassing or diversion of flow.

A. Clean the sewer line.

- B. Provide temporary plugs and bypassing as necessary.
- C. Perform television inspection.
- D. Provide specified documentation.

(R4, tab 3)

2. Interested parties were to bid separately on line items 001A and 001B for 5,280 LF and 1,120 LF of sewer line respectively and the work was to be completed by 15 October 1995. The completion date was established because the 15th of October is approximately the onset of freezing winter weather conditions thereafter restricting the work that can be accomplished (tr. 1/174).

3. Paragraph 1.1 of the General Requirements recommended that potential contractors “visit the work site to verify all dimensions and thoroughly familiarize [themselves] with existing conditions prior to submission of bid.” Paragraph 4, PROJECT SCHEDULE, required that within 14 days of notice to proceed and at least five working days prior to the beginning of work, the contractor should present his proposed schedule of work to the contracting officer and detailed the information to be included in that schedule of work. (R4, tab 3)

4. Paragraph 1.9 of Section 01300 of the Technical Specifications provides that the contracting officer requires 14 calendar days to review submittals and resubmittals (R4, tab 3). Section 02050 of the Technical Specifications, SEWER LINE TELEVISION INSPECTION, included the following submittal requirements:

- A. Work plan: The plan shall outline procedures proposed for the accomplishment of the work. The procedures shall provide for safe conduct of the work and coordination with other work in progress. The procedures shall include a detailed description of the methods and equipment to be used for each operation, and the sequence of operations.
- B. Documentation: The results of the television inspection shall be fully documented by the logs, photographs and video tapes. All video recordings shall be made at standard speed on VHS tapes. Television inspection logs shall be kept by the Contractor that clearly and accurately report the location in relation to an adjacent manhole, infiltration points, sags/high spots and cracks in the sewer pipe observed during the

inspection. In addition, other points of significance such as location of service connections, unusual conditions, splintered pipe, out of roundness, presence of debris or any other discernible features shall be recorded. Pipe defects or features shall be located by footage and clock reference and described in detail.

(R4, tab 3)

5. The specifications further detailed how the work was to be performed in paragraph 3.1 (page 02930-2) as follows:

A. Prior to commencing the television inspection of the sewer line, the line shall be hydraulically cleaned using a scour ball or other method. Provide 1/4 inch screening at the discharge opening of the downstream manhole to prevent the flushing of gravel or other debris into the sewer system.

B. Gravel, muck or other debris that accumulates on the screening shall be removed from the manhole and properly disposed of by the Contractor. Passing material from manhole to manhole shall not be permitted. All solids and semisolid shall be removed from the site at the end of each workday and transported in a manner that prevents spillage on streets or adjacent areas. Local regulations regarding hauling and disposal shall apply.

C. Installation of temporary plugs, sewer bypassing or diversion of flow shall be performed as necessary to insure that the television inspection provides a full view of pipe conditions and prevent sewage from backing up in the line upstream from the section to be inspected.

(R4, tab 3)

6. Paragraph 3.2 of the Technical Specifications, page 02930-2, provides as follows:

A. After cleaning provide a visual and audio record of the sewer line. The line and manholes shall be visually inspected by means of a high resolution closed circuit video camera and

voice recorder. The inspection shall be performed from manhole to manhole.

B. The camera shall be moved through the line in either direction at a moderate rate, stopping when necessary to permit documentation of the sewers line condition. The camera shall not be moved through the pipe at a speed greater than 30 feet per minute. [emphasis in original]

(R4, tab 3)

7. The RFQ was synopsisized in the Commerce Business Daily where the work was described as follows:

Perform a television inspection of approximately 6400 feet of 33 inch sewer line at Ft. Wainwright, Alaska in accordance with the contract drawings and specifications. Inspection shall include cleaning of the line, appropriate sized sewer plugs, and providing bypassing or diversion of flow.

(R4, tab 4)

8. On 29 August 1995, Mr. Chizoma Onyems as owner and Director of Operations of 4-D and Chizoma Company (Chizoma),^{*} submitted via facsimile transmission (fax) a quotation to perform line item 0001A for \$63,360, and line item 0001B for \$16,800, for a total of \$80,160 (R4, tab 5). On 5 September 1993, Chizoma amended his quotation via fax by increasing item 0001A to \$73,920 and item 0001B to \$13,440 for a total of \$87,360. In a cover letter Chizoma stated that all cleaning equipment would be shipped from Seattle, Washington and the entire operation would be completed within two to four working days. (R4, tabs 6, 7)

9. On 7 September 1993, Chizoma further amended his quotation by reducing the quote for item 0001A to \$45,144 and reducing item 0001B to \$9,576 for a total quotation of \$54,720 (R4, tab 8).

10. Pursuant to the Government's request, Chizoma, on 18 September 1995, provided a list of references for other projects he had performed (R4, tab 10).

^{*} The term "Chizoma" shall refer collectively to both Mr. Chizoma Onyems and the company he owns.

11. Linda Thynne (Thynne), the contracting officer, signed the purchase order on 20 September 1995 and Chizoma signed it on 26 September 1995. While Chizoma contends that he did not receive the scope of work (specifications) when he received the rest of the bid package via facsimile on 29 August 1995 and later by mail (tr. 1/22-23, 2/74), he admitted at trial that he had a copy of the complete statement of work and had read it when he signed the purchase order on 26 September 1995 (tr. 2/87).

12. On 26 September 1995, Chizoma advised Marcia Harker, who worked for Thynne, that he planned to ship his equipment via Seattle and consequently could not meet the 15 October 1995 completion date. Thus, Chizoma requested permission to start work on 28 November 1995 (R4, tab 12).

13. By letter of 27 September 1995, Thynne advised as follows:

Your request for an extension for the completion of the referenced order is denied. The completion date remains not later than 15 October 1995. This date is important because of possible litigation with the city over connecting city sewer lines and the difficulties of the weather conditions expected in November. Per our conversation on this date it is understood that your company will make every effort to meet the required date and that failure to do so will result in action being taken under the clause 5.249-8 "Default".

(R4, tab 12)

14. Although Chizoma advised on 27 September 1995 that he was declining to accept the contract because the Government refused to extend the delivery date (R4, tab 14), after he talked to Thynne on 28 September he advised that he agreed to deliver the contract by 15 October 1995 (R4, tab 17).

15. No pre-bid site inspection was held because none was requested (tr. 1/73).

16. On 4 October 1995 at about 7:00 PM California time, Mr. Onyems faxed the "Television Inspection Work Plan" to the Directorate of Contracting at Fort Richardson, Alaska (R4, tab 18). This was after the close of business at the Directorate of Contracting at Fort Wainwright, Alaska. Thursday and Friday, 5 and 6 October 1995 were work days at Fort Wainwright, 9 October 1995, a Monday, was a federal holiday and Tuesday 10 October 1995 was a work day.

17. On 11 October 1995, Mr. Onyems arrived at the work site on Fort Wainwright (tr. 1/55) and met with Nicholas Nugent (Nugent) the Government project manager for

the contract work (tr. 1/175, 2/62). This was after the work plan had been in the possession of the contracting officer for only three work days. Nugent showed Chizoma the post map and determined the work locations (tr. 1/175). Using a ruler, starting at the City Lift Station and working backwards, Nugent measured the contract distance which fell between Manholes (MH) 6 and 7. Nugent gave Chizoma the option of starting at either MH 6, which would give the Government slightly more coverage than required by contract or at MH 7 which would give the Government slightly less (tr. 1/178-79).

18. Chizoma and Nugent ultimately went to MH 7 to start. (tr. 1/180). They located three manholes but did not open them at that time. Nugent returned to his office (tr. 1/181). Chizoma opened MH 7 and MH 8 after Nugent left (tr. 1/182).

19. Chizoma found the ladders in MH 7 and MH 8 to be unsafe and thus he went to Nugent's office seeking to borrow a ladder. Nugent took Chizoma to the base maintenance shop and they selected a 32 foot expander ladder. (Tr. 1/183)

20. After dropping off the ladder at MH 7, Nugent testified that as he was about to leave to visit other projects for which he was responsible, he encountered two employees of the base Public Works office who had learned that a ladder had been borrowed and thus came out to see what work was being performed (tr. 1/194). One of them expressed concerns about the safety of the confined space entry contemplated in performing the work. These employees had no connection with the base safety office, but they had just completed training in confined space entry and had written procedures for themselves. (Tr. 1/195)

21. Nugent did not see the Public Works employees either get out of their truck or give anything to Chizoma, but they did give Nugent a copy of the Confined Space Entry Form, who in turn gave it to Chizoma (tr. 1/195-96; ex. F-1). Nugent testified he did not ask Chizoma to sign the form (tr. 1/198). Chizoma's recollection of this encounter is that the men got out of the truck, came up to him and insisted he sign the form but he refused to do so (tr. 2/64).

22. While at MH 7 for this second time on 11 October 1995, Nugent observed Chizoma setting up equipment preparatory to performing the contract work. He did not see any pumping gear or sewage cleaning gear (tr. 1/196), he only saw some garden hose (tr. 1/199). Nugent became concerned about the planned methodology for performing the work, because, in his view, to effectively block a 33-inch sewer line, a trailer mounted pump and several hundred feet of 6-8" fire hose was needed and none of that equipment was either visible or could possibly have been held in the rental vehicle Chizoma possessed. Nugent reasoned that if Chizoma used blockage, he had no capability of doing a bypass so there was the possibility of sewage backing up into the residences. (Tr. 1/198-99)

23. Nugent asked Chizoma how he was going to do a dry pipe inspection and how he was going to have a clean pipe to see the condition of the surface of the sewer pipe. Chizoma responded that he did not plan to do any restrictions and stated he did not have a copy of the scope of work and thus did not bid on the scope as stated. (Tr. 1/200; R4, tab 19)

24. Nugent then left the site and went to see the contracting officer, Thynne, and expressed his concern that the contractor was not fully ready to execute the contract as Nugent believed it was required to do. Thynne advised Nugent that the contract requirements had not changed. (Tr. 1/201-02)

25. Because of the concerns expressed to her by Nugent, late in the afternoon on 11 October 1995, Thynne went to the work site and observed Chizoma and his two employees at a manhole. They had a van sitting in front of the manhole and the only other equipment she observed "was some long, white rods or piping of some type." There were no barriers around or other indication there were open manholes. (Tr. 1/60-62; R4, tab 19)

26. Chizoma and his workers were videotaping the sewer line by floating the camera through on the sewage, but not blocking and cleaning the system (tr. 1/61-62). Thynne told Chizoma the Government required the sewer line to be blocked or bypassed in some way and cleaned so that one could see the full sewer line and not just the top portion. Chizoma insisted to Thynne that floating the camera through the sewer was working just fine if she would only look at a video monitor. (Tr. 1/63)

27. The videotape is part of the record and it clearly shows the presence of sewage and thus an inability to inspect the pipe in the area where the sewage is flowing (ex. F).

28. Thynne indicated to Chizoma that the method he was using was not satisfactory and called his attention to the Statement of Work. She testified that when she called his attention to provisions in the Statement of Work which concern blocking and cleaning, he indicated that he did not know how to do that and that, even though she showed him the Statement of Work using his copy, he said he had never read it and that she had never sent it to him. (Tr. 1/63)

29. The contracting officer told the contractor that the Government would not pay for videotaping with sewer flowing, that he would have to block and clean it first or else the Government would not accept the final product. She also told him he could not enter the manholes without taking proper safety precautions including the complete confined space entry requirements. (Tr. 1/65)

30. Before leaving the site on the afternoon on 11 October 1995, Thynne arranged a meeting with Chizoma for 9:00 AM the next day and asked him to review the parts of the Statement of Work they had discussed so that they could attempt to find some resolution the next morning (tr. 1/65-66, 2/65).

31. Because it was fairly obvious to Thynne from her discussions with Chizoma the previous evening that Chizoma had no idea how to block or bypass the sewer line or otherwise to properly proceed with performance, prior to the meeting she prepared a show cause notice (tr. 1/66-67; R4, tab 21).

32. Attending the meeting on 12 October 1995 in addition to Thynne and Chizoma were Nugent, Carl Hogken and Marcia Harker for the Government and Chizoma's wife and employee (Lucy Carmichael) for the contractor (tr. 1/67, 2/65). When asked if he had looked at the Statement of Work and found any way he could perform in accordance with it, Chizoma answered that he did not know any way he could do the work (tr. 1/67).

33. Thynne decided there was no way Chizoma could perform in accordance with the Statement of Work and thus she handed him the show cause letter (tr. 1/68) which had previously been prepared. The letter provided in part as follows:

Your are notified that the Government considers your failure to provide adequate safety precautions and proper work procedures as called for in the schedule of work a condition that is endangering performance of this order.

Since you have failed to perform in accordance with the order the Government is considering terminating the contract under the provisions for default. Pending a final decision in this matter it will be necessary to determine whether your failure to perform arose from causes beyond your control and without fault or negligence on your part. Accordingly you are given the opportunity to present, in writing, any facts bearing on the question within 10 days after receipt of this notice

Your failure to present any excuses within this time may be considered an admission that none exist.

(R4, tab 20)

34. Chizoma responded to the show cause notice through counsel on 13 October 1995. Counsel took the position that Chizoma had submitted a work plan summary which had been approved and that on 11 October 1995, they were proceeding in accordance with that work plan summary. Counsel asked Thynne to provide factual detail supporting the

allegations of safety violations and to specify which work procedures were not followed. (R4, tab 23)

35. The contracting officer replied to Chizoma's counsel on 16 October 1995, explaining that an incomplete package of documents was received the night of 4 October 1995 and the information seemed to indicate proper procedures would be utilized. As to safety requirements, the contracting officer advised that Chizoma's work plan included a confined space entry safety section, but that Chizoma failed to follow even the most basic steps of contacting the safety office prior to entry and checking for atmospheric contamination or preparing for oxygen deficiencies. As to performance of the contract requirements, the contracting officer advised that the Statement of Work which was part of the purchase order included bypassing and draining the sewer lines prior to video inspection and that Chizoma "repudiated his responsibility to perform this requirement." Moreover, the contracting officer denied that Chizoma was prevented from performing the order so long as he performed it as required in the statement of work. Finally, the contracting officer advised that unless Chizoma demonstrated the ability to perform in accordance with the Statement of Work, the contract would be terminated for default. (R4, tab 24)

36. Chizoma replied to the contracting officer's 16 October 1995 letter on 19 October 1995. As to the contracting officer's assertion that an incomplete work plan was provided, Chizoma questioned why the plan was not rejected or the concerns expressed early in the morning of 11 October 1995. Responding to the contracting officer's complaint that Chizoma did not adhere to confined space entry procedures prior to entry into the manholes, Chizoma advised that no entry had occurred due to having encountered rusted ladders in the manholes and thus there was no need to invoke the safety procedures. (R4, tab 25)

37. As to the allegation that Chizoma failed to perform bypassing or blocking and cleaning prior to video inspection, Chizoma stated as follows:

The requirement for by passing must be accomplished and in other [sic - order] to do that one must climb down the sewer line to do effective blockage without causing backwards flow of the sewer line, this was what I said to you. But all the ladders (not even one) leading to the man holes are rusted[.]

(R4, tab 25)

38. Finally, Chizoma outlined the conditions under which he would return to work:

1. The broken ladders leading to all the sewer lines are are [sic]assessable [sic]. No secondary ladder will be used to send employees down to block the sewer line[.]
2. 4-D work plan already sent to your office remain [sic] valid. Any changes respective to work plan requested must not contravene item #1.
3. Discussion with respect to second mobilization costs be effected.

(R4, tab 25)

39. Prior to his 19 October 1995 letter, Chizoma never complained that the condition of the ladders precluded entry into the manholes and in fact stated on site that use of a normal extension ladder would allow accomplishment of the work he intended to perform (R4, tab 26). Moreover, a site visit was recommended by paragraph 1.1 of the contract General Requirements “to verify all dimensions and thoroughly familiarize himself with existing conditions prior to submission of bid” and would have put Chizoma on notice of the condition of the ladders. (R4, tab 1 at 01025-1 and tab 26) The contract documents made no representations with respect to the ladders in the manholes, either to their existence or to their condition (R4, tab 1; ex. O).

40. On 21 December 1995, the contracting officer issued Modification P00002 terminating the subject purchase order for default based upon the following determination:

You have failed to perform in the time authorized by the purchase order. You failed to provide services as required under this purchase order, in accordance with specifications contained therein, and did not demonstrate willingness or ability to follow the procedures necessary for performance of this requirement. You attempted to video inspect without by-passing or otherwise draining the system. The alternative method of floating the camera thru the sewer line without by-passing was reviewed because of an alternate proposal by another vendor at a cost of \$15,527.17, but was declined because the bottom portion of the sewer line would not be visible. I have considered the information provided by you in response to the show cause notice and find your failure to perform to be without legal excuse.

(R4, tab 32)

41. By letter dated 2 December 1995, and received by the contracting officer on 27 December 1995, Chizoma demanded, pursuant to the Disputes clause, payment of his expenses of \$45,144 (R4, tab 34). By letter of 18 January 1996, the contracting officer advised Chizoma that in light of the termination for default issued on 21 December 1995, “no further information will be considered” (R4, tab 35).

42. On 31 January 1996, Chizoma appealed the termination for default to the ASBCA and that appeal was docketed as ASBCA No. 49550. On 13 February 1996, Chizoma appealed the decision refusing to pay the expenses of \$45,144 and that appeal was docketed as ASBCA No. 49598.

POSITIONS OF THE PARTIES

Appellant makes fifteen separately numbers arguments in its brief which are paraphrased below.

1. The Government should lose because it willfully destroyed evidence, *i.e.* telephone records which would show that the designer of the project warned Nugent not to allow entry into the sewer lines.
2. The contracting officer was inept in failing to act on the contractor’s work plan and she should have delayed Chizoma’s start date to determine if it was capable of performing the work.
3. Referring generally to OSHA regulations, the ladder provided to Chizoma by Nugent exposed his employees to a dangerous situation, apparently excusing his refusal to enter the manholes and perform in accordance with the Statement of Work.
4. The contracting officer did not conduct an independent investigation prior to terminating the contract for default and she made a determination with respect to confined space entry requirements without proper knowledge of those regulation.
5. Nugent issued an unauthorized change to the contract by issuing a ladder for Chizoma’s use.
6. While Chizoma demonstrated using exhibit Z how plugging and by-passing can be achieved, Nugent provided no exhibit or video to demonstrate how his version of a by-pass can be achieved.
7. Chizoma brought “perfect and complete equipment” to the site and Nugent failed to document it. Also, Chizoma could have rented the equipment it needed and thus the Government contention that there were no plugs or sufficient hoses was false.

8. Government witness Harker was not credible.
9. The Government withheld evidence from the design engineer that would have shown the condition of the sewer line he designed. It is obvious the sewer line could have been cleaned above ground without sending anyone into the sewer by using the ladder.
10. The termination for default was improper because Chizoma timely started and completed the work. The Government did not allow Chizoma to complete the work. The blocking and by-passing presented at hearing by Chizoma was the best solution.
11. Allowing the work to start implies approval of the work plan.
12. A site inspection was not necessary as all information needed was obtained from Government officials.
13. Confined Space Entry requirements are precautionary and are not applicable in this case because the work could be done above ground.
14. Chizoma had the experience and equipment required for the work.
15. The video submitted into evidence was done without anyone going below ground and therefore the termination for default was improper. The design engineer eliminated the issue of bypassing, and but for the destruction of telephone records, he could prove it.

We note that the record does not contain any credible evidence to support any of the above contentions. We further note that commencement of the work in accordance with the specifications was not conditioned upon approval of the work plan, and that Chizoma's exhibit Z demonstrating how the sewer could be partially plugged is not credible because it was only offered as a way to perform the work at trial and there is no evidence that Chizoma intended to use that method during performance, nor did he tell any involved Government official of his plan to use that method when asked to do so in the show cause notice almost two years earlier.

The Government contends that the delivery order was properly terminated for default and appellant is not entitled to payment of any expenses.

DECISION

The Default clause of the contract prescribed at FAR 52.249-8 (APR 1984) permits the Government to terminate the contract for default when, after issuance of a 10-day cure notice, the contractor fails to perform any provision of the contract. The contract clearly and unequivocally required the sewer line to be cleaned and blocked or

by-passed as necessary in order to videotape a full view of the conditions of the sewer line. Merely floating the camera on the sewage as it flowed prevented the taping of a full view of the conditions.

The contracting officer properly demanded compliance with the Statement of Work and Chizoma's refusal to comply was unwarranted. Accordingly, the termination for default was proper and appellant is not entitled to recover the expenses incurred.

The appeals are denied.

Dated: 17 February 2000

RICHARD SHACKLEFORD
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

CARROLL C. DICUS, JR.
Administrative Judge
Acting Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 49550, 49598, Appeals of 4-D and Chizoma, Inc., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals